STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	09-0313
vs	)	
	)	
BullsEye Telecom, Inc.	)	
	)	
Investigation into whether Intrastate	)	
Access Charges of BullsEye	)	
Telecom, Inc. are just and reasonable	)	
	)	

BULLSEYE TELECOM, INC.'S RESPONSE TO THE STAFF'S MOTION TO STRIKE

Now comes BullsEye Telecom, Inc. ("BullsEye") and in response to the Staff of the Illinois Commerce Commission's Motion to Strike Portions of BullsEye Telecom, Inc.'s Reply Testimony, states as follows:

The Commission Staff has moved to strike portions of the reply testimony of BullsEye witness Peter La Rose that the Staff alleges raises arguments that were not contained in the BullsEye Telecom, Inc.'s Initial Response Regarding the ICC Access Charge Investigation ("Initial Response"). AT&T filed a concurrence with that motion.[1] The Staff motion should be denied because:

- Every statement in the reply testimony is a direct response to testimony submitted by the Staff or Intervenors.

[1] AT&T Communications of Illinois, Inc.'s Concurrence With Staff Motion to Strike, filed March 15, 2010. This pleading responds to both the Staff motion and to AT&T's concurrence.

- The Staff motion is based on a standard of admissibility of rebuttal testimony that is not used by this Commission or any court. More specifically, the Staff argues that the only proper rebuttal testimony is testimony that contains arguments that did not exist at the time of the submission of direct testimony. The idea that parties' direct testimony must anticipate every argument an opponent could make is nonsensical and completely contrary to every judicial and administrative rule of evidence and procedure.

A. The Statements of Mr. La Rose All Respond to Staff and Intervenor Testimony.

The Staff has not and cannot allege that the reply testimony of Mr. La Rose should be stricken because it does not respond to the arguments made by Staff or Intervenor witnesses. Indeed, every single statement of Mr. La Rose that the Staff seeks to strike is a direct response to Staff and Intervenor arguments. The specific statements of Mr. La Rose that the Staff wishes to strike, and the testimony that Mr. La Rose is responding to is set forth below:

STATEMENT 1

> Specifically, he first argues that the imposition of a cap upon BullsEye's interexchange access rates would adversely affect its ability to negotiate with interexchange carriers regarding access rates. La Rose Rebuttal at 2-3. . .

Staff Motion, para. 9.

First, the agreement between BullsEye and AT&T was brought up by AT&T and Verizon in their response testimony (AT&T Ex. 1, p. 19-20, 25); (Verizon Ex. 1, p. 15, Footnote 38, p. 23). Mr. La Rose should be able to respond to the testimony of those witnesses with his own view of the relevance of that agreement to the issues in this proceeding. Second, the point that Mr. La Rose made, that placing a cap on BullsEye's access charges would harm its ability to negotiate such agreements in the future, is a response to the testimony of Staff and Intervenors

that CLECs have no incentive to provide lower access charges.[2] The fact that BullsEye was willing to negotiate its access charge rate with AT&T disproves the allegation that CLECs have absolutely no incentive to lower their access charges.

Mr. La Rose's observation that the imposition of a cap would inhibit such negotiations should not be controversial. The impact of tariffed rates on negotiations was recognized by the Seventh Circuit in *Wisconsin Bell Telephone Co. v. Bie*, 340 F.3d 441 (7th Cir. 2003). In *Bie*, the Seventh Circuit considered whether a state can order an ILEC to file tariffs containing the terms and conditions of the ILEC's interconnection offerings rather than proceeding with an arbitration under the Federal Act. The *Bie* Court rejected that procedure, stating:

> The requirement *has* to interfere with the procedures established by the federal act. It places a thumb on the negotiating scales by requiring one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price, so that bargaining begins from there.

Bie, 344 F.3d at 444.

As in *Bie*, the requirement that BullsEye cap its access charge at a certain level would place a thumb on the negotiating scales and force negotiations to begin at that level, from where they could only go down. It is inconceivable that AT&T and Verizon could raise the issue of this agreement, but that BullsEye could not point out that such an agreement was only possible

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[2] "Bullseye possesses market power in the pricing of its access services due to this lack of competitive alternatives. In the absence of regulatory oversight and restraint, it may use this market power to raise access rates above a level consistent with the PUA's just and reasonable rate requirement." Staff Ex. 1, p. 5-6; "Under these circumstances, market forces cannot constrain the CLEC's pricing behavior." (AT&T Ex. 1, p. 5); Regulatory intervention is therefore necessary to discipline CLECs' access rates. . ." (Verizon Ex. 1, p. 13); "CLEC Access Rate are not subject to any meaningful competition. If competition had any impact on switched access rates, you would see CLECs reducing their access rates as the market has become more and more competitive for retail services." (Sprint Ex. 1, p. 5).

because there is no Commission established cap on its access charges and thus, at this time, no thumb on the negotiating scales.

STATEMENT 2

> Mr. La Rose next contends that the Commission should address the issue of CLEC access rates in a proceeding of general applicability, rather than in one specific to BullsEye. La Rose Rebuttal at 4-5. . .

Staff Motion, para. 10

This statement of Mr. La Rose is a response to the testimony of Verizon witness Mr. Price that a Commission order adopting his recommendation to cap BullsEye's access charges to the level of AT&T's access charges would also result in Verizon affiliates lowering their access charges to the level of AT&T's access charges. Verizon Ex. 1, page 13, footnote 36. Mr. La Rose pointed out that this proceeding only involves BullsEye's rates and is not a generic proceeding that would obligate Verizon affiliates to lower their access charges. Mr. Price raised the issue of the applicability of this proceeding to the rates of other carriers, and Mr. La Rose is entitled to address the fact that this proceeding is not applicable to other carriers and that if Verizon's affiliates rates are to be lowered, they can only be done so through a generic proceeding and that such a proceeding would be a better process than targeting individual CLECs.

STATEMENT 3

> Mr. La Rose next argues that the Illinois General Assembly's intent, in enacting Article XIII of the Public Utilities Act, was to reduce regulatory burdens on CLECs and permit many, if not most, intercarrier matters to be determined by the free market. La Rose Rebuttal at 7. . .

Staff Motion, para. 11.

The Staff's attempt to strike Mr. La Rose's discussion of the Public Utilities Act is particularly troubling, given that Mr. Hoagg discussed the applicability of certain provisions in Article 9 and Article 13 to BullsEye's rates. Staff Ex. 1, p. 4-5. The Commission should reject the Staff's attempt to leave Mr. Hoagg's limited review of the Illinois PUA unrebutted.

Additionally, Mr. La Rose's reference to the Article XIII of the Illinois PUA was his reply to the recommendation of the Staff and Intervenors that the Commission treat intrastate access charges exactly the same way the FCC has treated interstate access charges. Mr. La Rose pointed out that this Commission must follow the Illinois Public Utilities Act, not the FCC's Access Charge Order. Thus, his testimony citing relevant portions of the Act and applying them to this proceeding is an entirely appropriate reply to the recommendations of the Staff and Intervenors that, as Mr. La Rose put it, "slavishly" followed the FCC. BullsEye Ex. 2, p. 6.

STATEMENT 4

> Mr. La Rose next contends that certain ILECs charge higher interexchange access rates than BullsEye, and states that, in its Access Charge Order, the FCC specifically countenances carriers with higher costs to charge higher access charges. La Rose Rebuttal at 4-5. . .

Staff Motion, para. 12

The Staff and Intervenors all quote extensively from the FCC's Access Charge Order. Mr. La Rose responded that the Staff and Intervenors have failed to quote from the portion of the FCC's Access Order that recognizes that CLECs with higher costs are entitled to charge higher access charges than the local incumbent.

AT&T's Concurrence argues that the references to the FCC's order should be stricken for lack of foundation because Mr. La Rose expressed unfamiliarity with that order during his cross

examination and he is not qualified as a regulatory expert. AT&T Concurrence, p. 2. AT&T's argument proves too much because in reality, none of the parties in this proceeding could lay a foundation for their witnesses' testimony about the FCC Access Charge Order - or any other regulatory or judicial decision. As BullsEye noted in its Motion to Strike Portions of the Testimony of Verizon Witness Don Price and AT&T Ex. LJB-C[3], expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible." *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003). Thus, experts cannot offer "legal conclusions that infringe on the jury's duties." *People v. Munoz*, 348 Ill. App. 3d 423, 440-41 (2004, 1st Dist, 1st Div.). The fact that Staff or Intervenor witnesses can claim to be expert witnesses on regulatory policy does not overcome this bar, as the prohibition is even applied to testimony by attorneys, such as in *Good Shepherd*, where the Court struck the testimony of a law professor. *Good Shepherd*, 323 F.3d at 564. The degree of expertise of a witness is irrelevant because such opinion is improper under any circumstances.

Thus, if Mr. La Rose's testimony referencing the FCC Access Charge Order is stricken, then the testimony of every witness in this proceeding addressing the FCC Access Charge Order and every other regulatory and judicial decision should be stricken. Nevertheless, as BullsEye also noted in its Motion to Strike: "While such testimony would be considered inadmissible legal conclusions in a court of law, allowing some leeway in Commission proceedings provides the ability to focus attention on relevant issues." BullsEye Motion to Strike, p. 2. Therefore, the better approach would be to allow all witnesses to refer to those decisions, but to expect parties

[3] Motion of BullsEye Telecom, Inc. to Strike Portions of the Testimony of Verizon Witness Don Price and AT&T Ex. LJB-C, filed March 15, 2010.

to submit briefs that do not rely on that testimony as to what those opinions mean, but rather, that provide independent analysis by counsel signing those briefs.

STATEMENT 5

> Mr. La Rose next alleges that BullsEye is somehow comparable to rural ILECs, and is thus entitled to charge similar access rates. La Rose Rebuttal at 12-13. . .

Staff Motion, para. 13

Staff and the Intervenors all recommended that BullsEye should have its rates capped at the rates charged by the local ILEC. In the case of BullsEye, which currently has customers in AT&T and Verizon territory, those two ILECs' rates would provide the basis for the caps on BullsEye's access charges. The response of Mr. La Rose to this argument is that BullsEye is closer to rural ILECs than it is to AT&T or Verizon in terms of customer base and customer density and thus closer to rural ILECs in its costs. Again, this is perfectly acceptable rebuttal to the testimony of the Staff and Intervenors. Moreover, it is consistent with the initial response of BullsEye, which stated that "as a small Competitive Local Exchange Carrier ("CLEC"), the switched access costs that BullsEye incurs are significantly higher than the same costs incurred by a large incumbent local exchange carrier ("ILEC")." BullsEye Initial Response, p. 1.

In summary, every single statement that the Staff seeks to strike is a direct response to the testimony of Staff and Intervenors. As shown in the next section of this brief, based on the rules of evidence and previous practice of this Commission, such testimony is admissible.

B. The Staff's Motion Is Inconsistent With the Rules of Evidence and Commission Practice.

The underlying theme of the Staff's motion is its following statement:

> In his Reply Testimony, Mr. La Rose raised numerous arguments that: (a) were known and available to BullsEye at the time it filed its Initial Response, but which it did not raise in its Initial Response; and (b) were essentially responsive to the Staff Report.
>
> Staff Motion, para. 5.

Part (b) above is simply not true. As discussed in the first section of this brief, the five statements that the Staff seeks to strike were directly responsive to Staff and Intervenor testimony. Those statements could not be "essentially responsive to the Staff Report" because that report made no recommendation other than that the Commission determine if BullsEye's rates are just and reasonable. Part (a) above articulates a rule of evidence that does not exist. According to the Staff, a party may only make arguments in rebuttal testimony that did not exist at the time of its direct testimony. Put another way, BullsEye should have correctly guessed every argument Staff and Intervenors would make and it should have rebutted those arguments in its Initial Response. This is an absurd rule that has no basis in law or this Commission's rules of practice. As shown above, every statement the Staff seeks to strike was a direct response to statements of the Staff and Intervenors. That fact alone is sufficient to deny the Staff's motion.

The rule propounded by the Staff would effectively require BullsEye to have anticipated in its Initial Response the arguments the Staff and Intervenors would make in their testimony. That rule has already been rejected by the Illinois Appellate Court.

> The People's argument is based entirely on the erroneous assumption that a utility has the burden of going forward on any and all issues which are conceivably relevant to the reasonableness of its proposed rates. This premise is directly contrary to the overwhelming weight of authority and would place an impossible burden on the utility of anticipating the basis of every intervenor's objection and of coming forward with evidence during its case-in- chief with respect to each objection.
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> *City of Chicago v. People of Cook County* , 133 Ill. App. 3d 435, 442, 478 N.E.2d 1369, 1375 (Ill. App. 1st Dist. 1985).

Ignoring that well settled precedent, the Staff bases its motion on a misreading of the Commission order in *Citizens Utilities Company of Illinois: Proposed general increase in water and sewer rates*, ICC Docket No. 84-0237, 1985 Ill. PUC Lexis 38 (March 13, 1985). In that case, the Commission rejected rebuttal evidence of a utility that consisted of an additional $300,000 in legal and administrative expenses that had not been requested in the utility's original request. *Citizens*, 1985 Ill. PUC Lexis at 45.

A reading of Citizens shows that the Staff's Motion to Strike is not supported by that order. First, the Commission stated the test for admissibility of rebuttal testimony:

> The judicial decision suggests that the Commission should allow a Respondent in a rate case to present rebuttal evidence that is directly responsive to the testimony presented by other participants earlier in the proceeding.
>
> Id.

In *Citizens*, the evidence of additional legal and administrative expenses was not a rebuttal to any particular testimony, but rather, was simply new evidence. As shown in the previous section of this brief, however, every statement that the Staff seeks to strike meets that standard because it responds to the testimony of the Staff and Intervenors. The Staff's motion does not deny that fact.

Second, the Commission indicated that the primary rationale for its decision was the fact that Citizens Utilities Co. was subject to of 83 Ill. Adm. 285.160, which provides that "Prepared direct testimony shall be in compliance with the Commission's Rules of Practice (General Order 154, to be codified as *83 Ill. Adm. Code 200*)." The Commission elaborated on the duties of utilities subject to General Order 154:

> This General Order provides a framework by which large and medium-sized utilities, including Respondent, are expected to file testimony, exhibits and other data at the outset of a rate case along with the proposed tariffs. The rule further

> provides that utilities may not make a presentation of any further evidence during the case-in-chief without a showing of good cause.

Citizens 1985 Ill. PUC Lexis at 47.

This proceeding is not a rate case and even if it could be characterized as one, BullsEye is not a utility subject to the rate case filing requirements of large and medium sized utilities. In fact, this is a proceeding with no established criteria for required direct testimony. When it prepared its Initial Response, BullsEye was faced with the very simple mandate from the Commission that it "present evidence as to why the rates charged by BullsEye Telecom, Inc., for intrastate access are just and reasonable." Initiating Order, p. 2. Not only is there no specific set of filing requirements for BullsEye, such as those established for utilities filing rate cases, but there is no Commission precedent for a case evaluating intrastate access charges or any other charges of a CLEC. The following question and answer of Mr. Hoagg illustrates the lack of clarity of BullsEye's evidentiary obligations in this proceeding:

> Q. Does the Illinois PUA set forth specific criteria or standard to be used by the Commission in determining whether any given rate is just and reasonable?
>
> A. No, it does not. And to my knowledge the Commission has not previously investigated any specific telecommunications (or other) rate to determine consistency with the PUA's just and reasonable rate requirement.

Staff Ex. 1, p. 4-5.

Thus, the problem faced by all parties in this proceeding was, as Mr. Hoagg put it, the "lack of specific defined criteria or standards." Staff Ex. 1, p. 5. It should be no surprise that BullsEye could not predict each and every argument made by the Staff and Intervenors. This situation is therefore completely different from the *Citizens* case, where a utility subject to the

comprehensive rate case filing requirements for direct testimony, ignored those requirements and attempted to submit previously existing costs in its rebuttal testimony.

Third, the Staff obfuscates another key difference between this proceeding and Citizens – the difference between evidence and arguments. In *Citizens,* the utility submitted *evidence* of additional costs that it could have submitted during its direct case. As a result, the Commission Staff was unable to completely analyze that evidence:

> Although the Commission had an opportunity to audit those items, Mr. Gorniak stated he had not analyzed those items. Certainly it is reasonable for a Commission Staff audit to focus upon those expense items a utility chooses to include as test year expenses rather than those items the utility does not seek to recover as an expense.
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> *Citizens* 1985 Ill. PUC Lexis at 49.

Here, BullsEye has not submitted new evidence. Rather, Staff seeks to strike *arguments* that it claims are new, even though those arguments are based on evidence that was already in the record or legal authority that need not be introduced as evidence. The AT&T-BullsEye agreement was attached to the testimony of AT&T witness Mr. Price. The lack of a generic proceeding against all LECs is a matter of public record. The FCC's Access Charge Order and Article 13 of the Public Utilities Act are legal authority that need not be introduced as evidence. The intrastate access charges of the rural LECs in Illinois were attached to the report of the Commission Staff (which was filed only one week before BullsEye had to file its Initial Response).

Thus, this is not a situation like *Citizens*, where the Staff was unable to evaluate new evidence. Rather, BullsEye provided its opinion of the impact of evidence that was already in the record on the justness and reasonableness of its rates. There will now be two rounds of briefs during which the Staff and Intervenors will have ample opportunity to rebut the arguments

provided by Mr. La Rose. However, because Mr. La Rose expanded on evidence in the record rather than providing new evidence, the Staff has not been prejudiced by its inability to review new evidence or inability to submit surrebuttal evidence.

Finally, BullsEye must respond to the Staff's argument regarding burden of proof because, again, the Staff demonstrates a lack of understanding of the obligations of parties in a Commission proceeding. The Staff states:

> BullsEye has the burden of proof in this proceeding. The term 'burden of proof' includes the burden of going forward with the evidence, and the burden of persuading the trier of fact. People v. Ziltz, 98 Ill. 2d 38, 43; 455 N.E.2d 70, 72; 1983 Ill. Lexis 453 at 6; 74 Ill. Dec. 40 (1983)."
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> Staff Motion, para. 7.

BullsEye does not disagree with this general principle of burden of proof, but it must point out the Staff's apparent confusion between the burden of going forward and the burden of persuasion. These are distinct burdens with separate timetables:

> As the trial court noted, what is generally termed "the burden of proof" has two aspects: (1) the burden of producing evidence as to a particular matter; and (2) the burden of persuading the trier of fact as to the existence of the fact asserted. The burden of producing evidence, which is sometimes called the burden of going forward, shifts from party to party during the course of a trial, but the burden of persuasion is always firmly allocated to one of the parties and does not shift.

Board of Trade v Dow Jones & Co., Inc., 108 Ill. App. 3d 681, 686; 439 N.E.2d 526, 530 (Ill. App. 1st Dist. 1982).

Here, faced with the lack of specific criteria or standards to determine if its rates are just and reasonable, BullsEye submitted an initial response that set forth reasons that it believes its rates are just and reasonable - primarily because, as a reseller of AT&T's services, BullsEye's input cost of service are extremely high. The burden of going forward then shifted to the Staff

and Intervenors. "Once a utility makes a showing of the costs necessary to provide service under its proposed rates, it has established a *prima facie* case, and the burden then shifts to others to show that the costs incurred by the utility are unreasonable because of inefficiency or bad faith." *Chicago v. ICC*, 133 Ill. App. 3d 435, 442-43, 478 N.E.2d 1369, 1375 (Ill. App. 1st Dist. 1985). The Staff and Intervenors then filed testimony providing their arguments as to why the Commission should place a cap on BullsEye's intrastate access charges and what criteria and standards should be used to set that cap. The burden then shifted back to BullsEye to rebut those arguments in its reply testimony. BullsEye did so with testimony that addressed the need for a cap (including Statements 1, 2 and 3) and the advisability of adopting the standards and criteria proposed by the Staff and Intervenors (including Statements 4 and 5).

At the end of this case, based on the totality of the record, the Commission will determine if BullsEye met its burden of persuasion to show that its rates are just and reasonable. BullsEye did not, as the Staff argues, have the obligation to meet that burden in its initial response to the Commission's order opening this proceeding. Putting the burden of persuasion on BullsEye at that time would have required it to anticipate and rebut the criteria and standards the Staff and the Intervenors would propose – an impossible task.

The Commission should always be wary of attempts to keep from its deliberations the arguments that a party has made in a proceeding. The Commission should be particularly concerned with the Staff's motion, given that this is an investigation initiated by the Staff, resulting in the opening of dockets against only a few CLECs, with no set clear and fair ground rules or precedent.

Conclusion

For the reasons stated above, the Staff of the Illinois Commerce Commission's Motion to Strike Portions of BullsEye Telecom, Inc.'s Reply Testimony and AT&T's Concurrence with that motion do not provide any justification for striking any part of BullsEye's testimony. The Commission should therefore deny the Staff's motion.

Dated: March 29, 2010

Respectfully submitted,

BullsEye Telecom, Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of BullsEye Telecom, Inc.'s Response to the Staff's Motion to Strike has been served upon the parties reported by the Clerk of the Commission as being on the service list of this docket, on the 29th day of March, 2010, by electronic mail.

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